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No. 95-743

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

FRANK PALERMO, et al.,

Petitioners,

v.

CLAUDE E. WOODS,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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26 pp

QUESTION PRESENTED

Whether termination of a prison disciplinary proceeding in favor of the prisoner is a requirement for a section 1983, 42 U.S.C. § 1983, action based on a claim of retaliatory interference with the claimant's civil rights.

LIST OF PARTIES

The petitioners are: Frank Palermo, John Preston, Michael Roberts, Harvey Grimmer, Leon Daigrepont, and Martin Regel.

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The respondent, Claude Woods, respectfully requests that this Court deny the petition for a writ of certiorari.

CITATIONS TO OPINIONS BELOW

The opinion and judgment of the Court of Appeals for the Fifth Circuit is reported at 60 F.3d 1161 (5th Cir. 1995) and appears as Appendix A. The unpublished opinion and judgment of the United States District Court for the Middle District of Louisiana appears as Appendix B.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered judgment on August 15, 1995. (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law ... abridging the freedom of speech, ... or the right of the people ... to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides:

> ... nor shall any State deprive any person of life, liberty, or property, without due process of law ....

Title 42, Section 1983 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Claude Woods, an inmate at the Louisiana State Penitentiary at Angola (LSP), contends that on January 14, 1990, LSP Sergeant Leon Daigrepont told Woods that if he did not become an informant, he would be punished. (Appellate Record at 828). In response to these threats, Woods immediately wrote and mailed a letter to United States District Court Judge Frank Polozola and Warden Larry Smith notifying them of the threat from Sergeant Daigrepont. (Id.).

Three days later, Woods gave LSP Lieutenant Frank Palermo a copy of the letter he had sent to Judge Polozola and Warden Smith. (Id. at 829). Woods asked Lieutenant Palermo to forward the letter to the shift supervisor. (Id.). A few hours later, Lieutenant Palermo issued a disciplinary report to Woods for defiance and stated that Woods would be placed in administrative lockdown. (Id.). The defiance was defined by Lieutenant Palermo as using the letter "to coerce [Palermo] into preventing Sgt. L. Daigrepont from doing his job." (Id.).

While Woods was packing his personal property, Captain Martin Regel, Lieutenant Palermo, and Sergeant John Preston issued a second disciplinary report to Woods for aggravated disobedience. (Id.). Woods claims that Lieutenant Palermo stated that the second report was insurance that the officers would not see Woods for quite some time. (Id.). Woods was then transferred to administrative lockdown.

The Disciplinary Board that reviewed the reports was

composed of Captain Mike Roberts and Mr. Harvey Grimmer. (Appellate Record at 288). Woods plead not guilty to both disciplinary charges. (Id.). Following a hearing, the Disciplinary Board found Woods guilty and sentenced him to four weeks loss of canteen, ten days isolation, and a quarters change. (Id.). Woods' attempt to pursue an administrative appeal failed because he did not follow the correct procedures. (Id. at 798).

On April 27, 1990, Woods filed a pro se claim in the United States District Court for the Middle District of Louisiana alleging violations of 42 U.S.C. §§ 1983, 1985(3), and 1986. (Id. at 831). Woods also claimed that the illegal acts directed toward him by the prison employees violated state law, as well as the first and fourteenth amendments to the Constitution. (Id.).

On January 20, 1994, the district court granted summary judgment on several of the claims, including all the claims made against the prison employees in their official capacities. (Appendix B). Because genuine issues of material fact existed about whether Palermo and Preston issued the disciplinary reports for retaliatory purposes, the court denied their motion for summary judgment on the basis of qualified immunity. (Id.). The court also declined to dismiss the remaining state law claims against Daigrepont, Regel, Palermo, Preston, Grimmer, and Roberts. (Id.). The court dismissed Dupont and Smith because they were not personally involved with the alleged constitutional torts. (Id.).

The remaining defendants appealed and Woods cross-appealed. (Appellate Record at 1,3). On October 14, 1994, the undersigned counsel, Henry D. Gabriel, was appointed by the court to represent Woods. On August 15, 1995, the United States Court of Appeals for the Fifth Circuit affirmed the district court's denial of summary judgment on the grounds of qualified immunity and dismissed the other appeals and Woods' cross-appeal for lack of appellate jurisdiction. (Appendix A).

REASONS FOR DENYING THE WRIT

I. The United States Court Of Appeals For The Fifth Circuit Correctly Held That Termination Of A Prison Disciplinary Proceeding In Favor Of The Prisoner Is Not A Requisite Of A Retaliatory Interference Claim Under 42 U.S.C. § 1983.

The United States Court of Appeals for the Fifth Circuit correctly held that termination of a prison disciplinary proceeding in favor of the prisoner is not a requisite of a retaliatory interference claim under 42 U.S.C. § 1983. Woods v. Smith, 60 F.3d 1161 (5th Cir. 1995). The Eighth Circuit is the only other circuit that has specifically addressed the issue and it has imposed a favorable termination requirement in this context. Henderson v. Baird, 29 F.3d 464 (8th Cir. 1994), cert. denied, 115 S.Ct. 2584 (1995); Earnest v. Courtney, 64 F.3d 365 (8th Cir. 1995). The Eighth Circuit, however, misperceives the relationship between a claim under section 1983 and the underlying disciplinary report.

The issue in a § 1983 retaliatory interference claim is whether there has been a violation of a constitutional right, not whether the underlying disciplinary report was valid. An action motivated by retaliation for the exercise of a constitutionally protected right is actionable, even if the act, when taken for a different reason, might have been legitimate. Mt. Healthy City School District Bd. of Education v. Doyle, 429 U.S. 274 (1977). Thus, a requirement that the disciplinary report be terminated in favor of the prisoner is inappropriate where a constitutional claim lies at the core of the complaint. The issue of whether there has been a violation of a constitutional right must be

decided by the courts, not by the defendant against whom the claim has been made. Woods, 60 F.3d at 1164-65.

The petitioners rely on an analogy with § 1983 malicious prosecution claims where favorable termination is an element of the offense. Heck v. Humphrey, 114 S.Ct. 2364 (1994). As the Fifth Circuit noted, this reliance is misplaced because a retaliatory interference claim is different from a malicious prosecution claim. Woods, 60 F.3d at 1165. The focus of a malicious prosecution claim is the ultimate merit of the underlying proceeding. The retaliation claim, on the other hand, focuses on the interference and whether there has been an obstruction of the exercise of a constitutional right. Id. This inquiry is separate from the underlying proceeding.

Furthermore, in a malicious prosecution claim, the underlying proceeding is decided by an independent judge or jury. In contrast, in this type of retaliatory interference claim, the underlying prison disciplinary proceedings are conducted by the correction officials against whom the claim is being brought. Thus, if termination of a disciplinary report in favor of the inmate is a required element, then the prison officials get to determine by their own acts whether they will be responsible to the prisoner. As the Fifth Circuit instructed, "the court with which [the prisoner] sought contact, and not his jailer, [must] determine the merits of his claim." Woods, 60 F.3d at 1165. Therefore, a requirement that the disciplinary report be terminated in favor of the prisoner is inappropriate in a § 1983

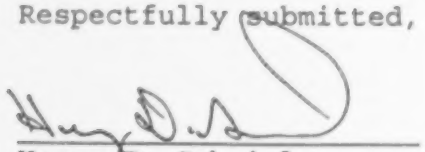
retaliatory interference claim.

The Fifth Circuit's decision does not interfere with the deference that should be afforded prison administrators in managing the prison. The Fifth Circuit expressly reaffirmed that prison officials must have wide latitude in the control and disciplining of inmates. Woods, 60 F.3d at 1166. See also Sandin v. Conner, 115 S.Ct. 2293, 2299 (1995). However, as the Fifth Circuit properly noted, this wide latitude "does not encompass conduct that infringes on an inmate's substantive constitutional rights." Woods, 60 F.3d at 1166. To assure that no undue restrictions are placed on actions legitimately motivated by concerns of prison order and discipline, while still ensuring the protection of substantive constitutional rights, the Fifth Circuit properly concluded that retaliatory interference claims are to be "carefully scrutinized" and inmates must allege a violation of a specific constitutional right. Id.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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December, 1995.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Appendix A

Claude E. WOODS, Plaintiff-Appellee, Cross-Appellant,

v.

Larry SMITH, et al., Defendants-Appellants, Cross-Appellees.

No. 94-30010.

United States Court of Appeals, Fifth Circuit.

Aug. 15, 1995.

Prisoner brought § 1983 action against prison officials, alleging that officials took disciplinary action against him in retaliation for his constitutional right of access to courts. The United States District Court for the Middle District of Louisiana, Frank J. Polozola, J., denied defendants' summary judgment motion on basis of qualified immunity, and declined to dismiss state law claims against them. On appeal, the Court of Appeals, Politz, Chief Judge, held that: (1) prisoner was not required to establish that disciplinary proceedings were ultimately terminated in his favor to succeed in action; (2) Court of Appeals lacked jurisdiction on interlocutory appeal to consider trial court's refusal to dismiss pendent state law claims.

Affirmed in part, and dismissed in part.

1. Federal Courts ⇐579

Court of Appeals had jurisdiction to review interlocutory appeal from trial court's refusal to grant summary judgment to defendants in § 1983 action on basis of qualified immunity, since issue was purely legal question. 42 U.S.C.A § 1983.

2. Federal Courts ⇐776

Court of Appeals reviews de novo trial court's denial of summary judgment motion. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

3. Federal Civil Procedure ⇐2470, 2470.4

Movants for summary judgment may prevail only if they have demonstrated that there are no genuine issues of material fact and that they are entitled to summary judgment as matter of law. Fed.Rules Civ.Proc. Rule 56, 28 U.S.C.A.

4. Civil Rights ⇐214(2)

Defense of qualified immunity protects public official from both litigation and liability, absent showing that official violated constitutional right that was clearly established at time of incident.

5. Civil Rights ⇐214(2)

In assessing defense of qualified immunity, Court of Appeals must first inquire whether plaintiff has asserted violation of clearly established constitutional right, and if that inquiry is answered in affirmative, Court of Appeals then determines whether defendant's conduct was objectively reasonable in light of established law.

6. Prisons ⇐4(10.1), 13(4)

Prison official may not retaliate against or harass inmate for exercising right of access to courts, or for complaining to supervisor about guard's misconduct.

7. Civil Rights ⇐135

Termination of prison disciplinary proceeding in favor of prisoner is not requisite of retaliatory interference claim.

8. Civil Rights ⇐135

Prison disciplinary action motivated by retaliation for prisoner's exercise of constitu-

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tionally protected right is actionable, even if act, when taken for different reason, might have been legitimate.

9. Civil Rights ⇐135

To state claim of retaliation, inmate must allege violation of specific constitutional right and be prepared to establish that but for retaliatory motive, complained of incident would not have occurred.

10. Civil Rights ⇐235(7)

In action by prisoner for retaliation by prison officials for prisoner's exercise of constitutional right, mere conclusionary allegations of retaliation will not withstand summary judgment challenge, but rather, inmate must produce direct evidence of retaliatory motivation, or allege chronology of events from which retaliation may plausibly be inferred.

11. Federal Courts ⇐770

Court of Appeals lacked jurisdiction to consider, on interlocutory appeal of denial of qualified immunity to prison officials in § 1983 action, trial court's refusal to dismiss pendent state law claims against other prison officials, even though all federal claims against them had been dismissed.

12. Federal Courts ⇐574

Court of Appeals did not have jurisdiction to consider whether trial court's refusal to dismiss state law claims against prison officials was proper on basis that officials raised Eleventh Amendment immunity as defense to state claims so as to fall within limited category of cases that warrant collateral review, where trial court did not deny such a claim of immunity in its refusal to dismiss state claims. U.S.C.A. Const.Amend. 11.

Appeals from the United States District Court for the Middle District of Louisiana.

Before POLITZ, Chief Judge, HIGGINBOTHAM and DeMOSS, Circuit Judges.

POLITZ, Chief Judge:

On appeal is the partial grant of summary judgment in the civil rights action by Claude E. Woods, an inmate at the Louisiana State Penitentiary at Angola, against various corrections officials. Two officers appeal the denial of summary judgment on the basis of qualified immunity; two officers appeal the court's refusal to dismiss certain state law claims; Woods cross appeals the adverse summary judgment rulings. For the reasons assigned we affirm that part of the trial court's rulings over which we have interlocutory appellate jurisdiction and dismiss the appeals for that part of the rulings over which we lack that jurisdiction.

Background

Woods alleges that on January 14, 1990 corrections officer Sergeant Leon Daigrepont warned him that if he did not become an informant bad things would happen to him, including transfer to a less desirable part of the prison. On that day Woods reported the alleged threat by letter addressed to United States District Judge Frank J. Polozola, who was presiding over pending prison litigation, and to Larry Smith, the Warden of Angola.[1]

1. The letter was entitled *"RE: NOTICE OF ANTICIPATED CONSPIRACY TO COMMIT MALFEASANCE AND FALSIFY DOCUMENTS."* Woods wrote that "This notice is in an anticipation of future activities by Correctional Officer, Louisiana State Penitentiary

Three days later Woods handed a copy of the letter to Lieutenant Frank Palermo with the request that he pass the copy to the shift supervisor. A few hours later Palermo informed Woods of the issuance of a disciplinary charge for defiance and that he would be placed in administrative lockdown.[2] The defiance was defined by Palermo as Woods' use of the referenced letter "to coerce [Palermo] into preventing Sgt. L. Daigrepont from doing his job."

Later that day Woods received a second disciplinary charge, this one signed by Sergeant John Preston, accusing Woods of refusing verbal orders to pack his belongings for the transfer to administrative segregation. Woods asserts that Captain Martin Regel and Lieutenant Palermo handed him the second disciplinary report while taunting him as he packed his bags. Woods alleges that Regel stated: "I know you know that we Security people stick together like you prisoners, didn't Sergeant Daigrepont tell you he gets what he wants?"; and Palermo added "This will make sure we don't see you around here for awhile." Woods was then removed to administrative lockdown.

Woods pled not guilty to both disciplinary charges. Following a hearing, the prison Disciplinary Board found him guilty and he was sentenced to four weeks loss of canteen, ten days isolation, and a change in quarters. Woods' efforts to pursue an administrative appeal foundered.[3]

In April 1990 Woods filed the instant *pro se* complaint, invoking 42 U.S.C. §§ 1983, 1985(3), and 1986, against Smith, Palermo, Daigrepont, and Regel,[4] alleging *inter alia*, that the defendants conspired to issue false disciplinary reports in retaliation for his exercise of the constitutional right of access to the courts. Woods claimed that the acts directed toward him violated state law, as well as the first and fourteenth amendments to the Constitution. He amended his complaint to add as defendants Preston, Captain Mike Roberts, Harvey Grimmer, and Major Leslie Dupont. He sought monetary, declaratory, and injunctive relief.

The district court granted summary judgment on several of Woods' claims, including all made against the defendants in their official capacities. Finding the existence of genuine issues of material fact regarding whether Preston and Palermo issued the disciplinary reports for a retaliatory purpose, the court denied their motion for summary judgment on the basis of qualified immunity. Finally, the court declined to dismiss the remaining state law claims against Daigrepont, Regel, Palermo, Preston, Grimmer, and Roberts. The remaining defendants timely appealed and Woods cross-appealed.[5]

Analysis

[1] Preston and Palermo appeal the trial court's refusal to grant summary judgment

at Angola, Leon DaigrePont, Sgt., respectfully."

2. The disciplinary report reflected 11:15 a.m. as the time of the incident. This was the approximate time Woods had asked that his letter be forwarded to the shift supervisor.

3. Woods initiated two Administrative Remedy Procedures arising out of this matter. The appeals were rejected because the appropriate administrative remedy for disciplinary matters is the disciplinary process and the appeal procedures. The district court determined that Woods had attempted to exhaust his administrative remedies in good faith, under 42 U.S.C. § 1997e(a)(1).

4. Regel was identified as John Doe in the initial complaint.

5. The court dismissed Dupont and Smith after determining that they were not personally involved with the alleged constitutional torts. Woods does not appeal this dismissal.

on their qualified immunity defense, challenging the court's conclusions regarding the legal elements of the retaliation claim.[6] Faced with the purely legal question whether Woods' complaint stated a constitutional cause of action, we have jurisdiction to review this interlocutory judgment.[7] Woods contests our appellate jurisdiction, pointing to the trial court's finding of disputed issues of material fact. Collateral review would nonetheless be appropriate if we accept the defendants' contention that the disputed facts are not material to the essential issue of qualified immunity.[8]

[2-5] We review *de novo* the district court's denial of a summary judgment motion. Movants may prevail only if they have demonstrated that there are no genuine issues of material fact and that they are entitled to summary judgment as a matter of law.[9] The defense of qualified immunity protects a public official from both litigation and liability, absent a showing that the official violated a constitutional right that was clearly established at the time of the incident.[10] In assessing the defense we must first inquire whether the plaintiff has asserted the violation of a clearly established constitutional right. If that inquiry is answered in the affirmative, we then determine whether the defendant's conduct was objectively reasonable in light of the established law.[11]

[6] Woods avers that Palermo and Preston filed the two disciplinary reports in retaliation for his letter to Judge Polozola and Warden Smith. He maintains that these actions violated his right to be free from retaliation for the exercise of his first amendment right of access to the courts. The law of this circuit is clearly established, and was so in 1990 when the instant disciplinary charges issued, that a prison official may not retaliate against or harass an inmate for exercising the right of access to the courts, or for complaining to a supervisor about a guard's misconduct.[12] The defendants candidly concede that this is a claim of constitutional proportions which is actionable under section 1983, but advance the proposition that Woods may not allege such a claim unless he first establishes that the underlying disciplinary

6. The magistrate judge stated the necessary elements of a retaliation claim as: (1) a prison official acting under color of state law; and (2) intentional retaliation for the exercise of a constitutionally protected activity.

7. *See Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (holding that the district court's denial of a claim of qualified immunity is appealable, to the extent that it turns on an issue of law.)

8. *See Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (explaining that the issue of qualified immunity should be resolved at the earliest possible stage of litigation); *Lampkin v. City of Nacogdoches*, 7 F.3d 430 (5th Cir.1993) (explaining that collateral order jurisdiction does not exist if defense cannot prevail as a matter of law), *cert. denied*, — U.S. —, 114 S.Ct. 1400, 128 L.Ed.2d 73 (1994); *Samaad v. City of Dallas*, 940 F.2d 925, 942 (5th Cir.1991) (finding jurisdiction to review, even though "the denial of qualified immunity ultimately turned on an issue of fact, the only reason that is so is that the court erroneously decided an issue of law.").

9. *Lampkin*.

10. *Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991).

11. *Spann v. Rainey*, 987 F.2d 1110 (5th Cir. 1993).

12. *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir.), *opinion amended in part and vacated in part*, 688 F.2d 266 (5th Cir.1982), *cert. denied*, 460 U.S. 1042, 103 S.Ct. 1438, 75 L.Ed.2d 795 (1983); *Gibbs v. King*, 779 F.2d 1040 (5th Cir.), *cert. denied*, 476 U.S. 1117, 106 S.Ct. 1975, 90 L.Ed.2d 659 (1986); *Andrade v. Hauck*, 452 F.2d 1071 (5th Cir.1971).

proceedings were ultimately terminated in his favor.

[7] We are not persuaded. Under this circuit's controlling precedents, favorable termination is not a requisite of a retaliatory interference claim.[13] Defendants rely heavily on an analogy with a section 1983 malicious prosecution claim where we have held favorable termination to be an element of the offense.[14] The two causes of action, however, have an essential difference. As we explained in *Brummett*, "[t]he essence of a malicious prosecution claim is a groundless prosecution."[15] Indeed, the focus of that action is the ultimate merit of the underlying proceeding. The retaliation claim, on the other hand, focuses on the interference, asking only whether there has been an obstruction of the exercise of a constitutional right.[16]

Further, in a malicious prosecution claim, resolution of the underlying proceedings typically is within the province of a judge, jury, or senior prosecutor. This differs sharply from the procedures at bar where the disciplinary proceedings are conducted solely by corrections officials. Mindful of that critical difference, we are not prepared to require a favorable termination before examining an otherwise legitimate constitutional complaint. Such a requirement would unfairly tempt corrections officers to enrobe themselves and their colleagues in what would be an absolute shield against retaliation claims.[17] This we will not do, for as we previously have stated, "the court with which [the inmate] sought contact, and not his jailer, will determine the merits of his claim."[18]

[8] We emphasize that our concern is whether there was retaliation for the exercise of a constitutional right, separate and apart from the apparent validity of the underlying disciplinary report.[19] An action motivated by retaliation for the exercise of a constitutionally protected right is actionable, even if the act, when taken for a different reason, might have been legitimate.[20] Our inquiry today looks only to whether there has been a violation of a constitutional right. As our colleagues of the Seventh Circuit have held, proceedings that are not otherwise constitutionally deficient may be invalidated by

13. *But see Henderson v. Baird*, 29 F.3d 464 (8th Cir.1994) (effectively imposing a favorable termination requirement in this context), *cert. denied*, — U.S. —, 115 S.Ct. 2584, — L.Ed.2d — (1995).

14. *Brummett v. Camble*, 946 F.2d 1178 (5th Cir.1991), *cert. denied*, — U.S. —, 112 S.Ct. 2323, 119 L.Ed.2d 241 (1992). *See also Heck v. Humphrey*, 504 U.S. 965, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994).

15. *Brummett*, 946 F.2d at 1183.

16. This court has held that a prisoner must show favorable termination prior to bringing a section 1983 claim based simply on the filing of a false disciplinary charge, absent an allegation of retaliatory interference with the exercise of a constitutional right. *Ordaz v. Martin*, 5 F.3d 529 (5th Cir.1993) (unpublished). Drawing an analogy with malicious prosecution, we reasoned that absent proof of favorable termination there was no arguable basis for finding the violation of a federally protected right. Such reasoning is inapplicable where a claim of constitutional dimension lies at the very core, however, of the complaint.

17. *See Orebaugh v. Caspari*, 910 F.2d 526 (8th Cir.1990) (Heaney, J., dissenting).

18. *Andrade*, 452 F.2d at 1072.

19. Compare these facts with those in *Ordaz*, where the petitioner's claim was based solely on the falsity of the disciplinary reports.

20. *See Mt. Healthy City School Board District Bd. of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *Jackson v. Cain*, 864 F.2d 1235 (5th Cir.1989); *Smith v. Maschner*, 899 F.2d 940 (10th Cir.1990); *Franco v. Kelly*, 854 F.2d 584 (2d Cir.1988).

retaliatory animus.[21] Our colleagues in the Eleventh Circuit have opined that an allegation of retaliatory disciplinary charges could give rise to either an independent section 1983 action or be part of a procedural due process review of the disciplinary hearing.[22]

Further, adding a favorable termination requirement in this setting would create the anomaly of establishing a more onerous exhaustion requirement for section 1983 actions than is required in habeas corpus proceedings. Unlike habeas claims, it is clearly settled that, except for the limited exception Congress has established, exhaustion of state judicial or administrative remedies is not a prerequisite to the bringing of a section 1983 claim.[23] The effect of a favorable termination requirement could conceivably defer review of a civil rights action until the Supreme Court has reviewed a state adjudication, or precluding it altogether by denying a writ of certiorari.

While we remain fully supportive of the proposition that prison officials must have wide latitude in the control and disciplining of inmates, that "latitude does not encompass conduct that infringes on an inmate's substantive constitutional rights."[24] Within that limitation we intend no undue restriction of actions legitimately motivated by concerns of prison order and discipline. We agree with our colleagues of the Fourth Circuit when they cautioned:

> The prospect of endless claims of retaliation on the part of inmates would disrupt prison officials in the discharge of their most basic duties. Claims of retaliation must therefore be regarded with skepticism, lest federal courts embroil themselves in every disciplinary act that occurs in state penal institutions.[25]

[9, 10] To assure that prisoners do not inappropriately insulate themselves from disciplinary actions by drawing the shield of retaliation around them, trial courts must carefully scrutinize these claims. To state a claim of retaliation an inmate must allege the violation of a specific constitutional right and be prepared to establish that but for the retaliatory motive the complained of inci-

21. *Cain v. Lane*, 857 F.2d 1139 (7th Cir.1988). *See also Black v. Lane*, 22 F.3d 1395 (7th Cir.1994) (rejecting defendant's claim that filing of false disciplinary charges does not state a due process claim where procedural requirements are met and disciplinary action is supported by some evidence, because retaliatory issuance of false disciplinary charges can themselves amount to a violation of substantive due process); *Franco*, 854 F.2d at 589 (overturning district court's ruling that procedural due process in disciplinary proceeding could eliminate liability for intentional filing of false charges; the court explained that because the right of access to the courts is substantive rather than procedural, it "cannot be obstructed, regardless of the procedural means applied.").

22. *Maschner*.

23. *See* 42 U.S.C. § 1997e (conferring the district court with discretion to require an inmate to exhaust prison grievance procedures prior to having case heard in federal court); *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982).

In *Patsy*, the Court considered section 1983's legislative history, and concluded that one reason Congress did not impose an exhaustion requirement was its belief "that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights." *Id.* at 505, 102 S.Ct. at 2562. *See also McNeese v. Bd. of Educ.*, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963); *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), *overruled in part on other grounds, Monell v. Dept. of Social Serv.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

24. *Franco*, 854 F.2d at 590.

25. *Adams v. Rice*, 40 F.3d 72, 74 (4th Cir. 1994), *cert. denied*, — U.S. —, 115 S.Ct. 1371, 131 L.Ed.2d 227 (1995).

dent—such as the filing of disciplinary reports as in the case at bar—would not have occurred.[26] This places a significant burden on the inmate. Mere conclusionary allegations of retaliation will not withstand a summary judgment challenge.[27] The inmate must produce direct evidence of motivation or, the more probable scenario, "allege a chronology of events from which retaliation may plausibly be inferred."[28] Although we decline to hold as a matter of law that a legitimate prison disciplinary report is an absolute bar to a discrimination claim, the existence of same, properly viewed, is probative and potent summary judgment evidence, as would be evidence of the number, nature, and disposition of prior retaliation complaints by the inmate.

[11] Defendants Daigrepont and Regel contest the trial court's refusal to dismiss the remaining state law claims, observing that all federal claims against them have been dismissed. We lack jurisdiction to reach the merits of that appeal. Although the collateral order doctrine allows that review of the district court's denial of qualified immunity to Preston and Palermo, that allowance does not confer "pendent appellate jurisdiction" over the other issues.[29]

[12] Nor can we derive jurisdiction from the fact that the defendants raise eleventh amendment immunity as a defense to the state law claims. Although the Court recently emphasized that denials of eleventh amendment immunity, like denials of qualified immunity, fall within the limited category of cases that warrant collateral review under *Cohen v. Beneficial Industrial Loan Corporation*,[30] we find no such denial here in the trial court's refusal to dismiss the state law claims. The judgment appealed, therefore, does not satisfy the *Cohen* requirement for collateral review.

Woods cross-appeals the district court's partial grant of summary judgment for the defendants. The defendants move to dismiss the cross-appeal because the district court's ruling was not a final appealable order. Agreeing that we have no jurisdiction to consider the court's interlocutory order, that motion is granted.[31]

26. *Mt. Healthy; Maschner; Orebaugh* (Heaney, J., dissenting); *McDonald v. Hall*, 610 F.2d 16 (1st Cir.1979).

27. *See Richardson v. McDonnell*, 841 F.2d 120 (5th Cir.1988) (upholding summary judgment dismissal of retaliation claim where inmate never offered documentary or testimonial evidence in support of assertions).

28. *See Cain*, 857 F.2d at 1143 n. 6; *McDonald; Maschner*.

29. *See Swint v. Chambers County Commission*, — U.S. —, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995) (finding no pendent party appellate jurisdiction where court based review on considerations of judicial economy); *McKee v. City of Rockwall, Tex.*, 877 F.2d 409, 413 (5th Cir.1989) (refusing to find "so strange an animal as 'pendent party interlocutory appellate jurisdiction.' "), *cert. denied*, 493 U.S. 1023, 110 S.Ct. 727, 107 L.Ed.2d 746 (1990).

Although in *Swint* the Court implied that in rare circumstances pendent appellate jurisdiction may be proper—if issues were "inextricably intertwined" or where "review of the former was necessary to ensure meaningful review of the latter"—defendants have not advanced reasons for review more compelling than those rejected by the Court in *Swint*, — U.S. at —, 115 S.Ct. at 1212. *See also Silver Star Enterprises, Inc. v. M/V Saramacca*, 19 F.3d 1008 (5th Cir.1994) (finding two orders not inextricably intertwined for purposes of pendent appellate jurisdiction).

30. 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, — U.S. —, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993).

31. Fed.R.Civ.P. 54(b).

The judgment denying summary judgment on the grounds of qualified immunity to Palermo and Preston is AFFIRMED. The other appeals and Woods' cross-appeal are DISMISSED for lack of appellate jurisdiction.

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Appendix B

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

CLAUDE E. WOODS

VERSUS

LARRY SMITH, ET AL

CIVIL ACTION

NO. 90-356-B

O P I N I O N

After independently reviewing the entire record in this case and for reasons set forth in the April 6, 1993 Magistrate Judge's Report to which an objection and a motion for reconsideration were filed and to the October 25, 1993 Magistrate Judge's Report to which an objection was filed:

IT IS ORDERED that the plaintiff's claims against the defendants in their official capacities be DISMISSED.

IT IS FURTHER ORDERED that the defendants' motion for summary judgment be GRANTED on the plaintiff's claims that: Daigrepont threatened to harm the plaintiff if he did not act as an informant; plaintiff was denied access to courts; plaintiff was denied due process when he was placed in administrative lockdown; plaintiff's due process rights were violated when the defendants failed to investigate Daigrepont's alleged wrongdoing; the disciplinary board imposed an excessive sentence; and that the defendants conspired to have the plaintiff locked up on false disciplinary charges.

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IT IS FURTHER ORDERED that the defendants' motion for summary judgment be GRANTED on the plaintiff's claim that his due process rights were violated when the disciplinary board members, Michael Roberts and Harvey Grimmer, failed to dismiss the disciplinary reports on the ground that the plaintiff was illegally placed in administrative lockdown.

IT IS FURTHER ORDERED that in all other respects the defendants' motion for summary judgment be DENIED.

IT IS FURTHER ORDERED that the matter be referred back to Magistrate Judge for further proceedings.

Baton Rouge, Louisiana, ~~December~~ Jan. 2, 1994 ~~1993~~.

FRANK J. POLOZOLA
UNITED STATES DISTRICT JUDGE